

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs September 9, 2009

CHARLES J. MILLER v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Franklin County
No. 16297& 17070 Thomas W. Graham, Judge

No. M2008-01861-CCA-R3-PC - Filed February 18, 2010

The petitioner, Charles J. Miller, pled guilty to driving under the influence (DUI), fourth offense, on February 27, 2006, and pled guilty to felony failure to appear on June 28, 2006. He received a total of three and a half years of probation for both offenses. The circuit court revoked his probation on December 12, 2006, based on new criminal conduct. The petitioner did not directly appeal the revocation of his probation. He filed a petition for post-conviction relief on November 16, 2007, and later amended the petition to include a request for a delayed appeal. The post-conviction court dismissed the petition. Upon our review of the record, we affirm the post-conviction court's dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

Joseph E. Ford, for the appellant, Charles J. Miller.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; James Michael Taylor, District Attorney General; and Steven M. Blount, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

This matter is before the court as a post-conviction challenge to the revocation of the petitioner's probation. In case number 16297, the petitioner pled guilty on February 27, 2006, to driving under the influence, fourth offense, a Class E felony, and received a

sentence of two years probation after serving 150 days in the Tennessee Department of Correction. The trial court granted the petitioner a furlough on February 28, 2006, but the petitioner failed to return to custody on time. As a result, he was charged with case number 17070, felony failure to appear, a Class E felony, to which he pled guilty on June 28, 2006. The trial court sentenced him to one and a half years probation, to be served consecutively to case number 16297. On October 20, 2006, Officer Randy Wildes of the Decherd Police Department arrested the petitioner for DUI, seventh offense, driving on a revoked license, and leaving the scene of a property damage accident.¹ The Circuit Court of Franklin County, Judge Thomas W. Graham presiding, revoked the petitioner's probation in case numbers 16297 and 17070 and ordered that the petitioner serve the remainder of his sentences in confinement. The record before us does not include the transcript of the probation revocation hearing, but the record reflects that an assistant public defender represented the petitioner during the probation revocation proceedings. The record further reflects that the petitioner did not directly appeal the revocation of his probation.

On November 16, 2007, the petitioner filed a petition for post-conviction relief challenging the revocation of his probation. As grounds for relief, the petitioner averred that he received ineffective assistance of counsel and that the arresting officer did not have justification for his arrest. The post-conviction court appointed counsel for the petitioner, and subsequently, the petitioner filed an amendment to request a delayed appeal. The court held an evidentiary hearing on July 8, 2008, after which it found that the petitioner did not show that he was prejudiced and dismissed the petition for post-conviction relief. The petitioner now appeals.

Analysis

The petitioner argues that the post-conviction court (1) made errors in the admission and exclusion of evidence at the post-conviction hearing and (2) erred in finding that the petitioner received effective assistance of counsel at the probation revocation proceedings. The petitioner further argues that the post-conviction court erred in denying a delayed appeal from the order to revoke probation. The state responds that the post-conviction court lacked jurisdiction to consider the petition for post-conviction relief from the revocation of probation.

¹ During the post-conviction hearing, the district attorney general said that the state dismissed the charges incurred on October 20, 2006, after the trial court revoked the petitioner's probation. The post-conviction court found that the petitioner's admission that he drove a vehicle was sufficient grounds for revoking probation.

Post-conviction relief is granted when a petitioner's conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Tennessee or United States Constitution. *See* Tenn. Code Ann. § 40-30-103. Looking to the Tennessee Supreme Court Rules, we note that once a petition is filed, a judge shall review the petition and determine whether the petition states a colorable claim. Tenn. Sup. Ct. R. 28, § 6(B)(2). A colorable claim is "a claim in a petition for post-conviction relief, that, if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004) (quoting Tenn. Sup. Ct. R. 28, § 2(H)). If the reviewing court determines that the facts of the petition fail to establish a "colorable claim," it may dismiss the petition. *See* Tenn. Code Ann. § 40-30-106(f). Furthermore, a petition without a colorable claim may be dismissed by the court without appointing counsel or holding an evidentiary hearing. *See Blair v. State*, 969 S.W.2d 423, 424 (Tenn. Crim. App. 1997). In this case, the post-conviction court did not explicitly state that the petitioner's claim was colorable but proceeded to appoint counsel and hold an evidentiary hearing.

The post-conviction judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Those findings of fact are afforded the weight of a jury verdict, and this court is bound by the findings unless the evidence in the record preponderates against those findings. *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

It is well-established that a post-conviction petition may not be used to collaterally attack an order revoking probation. "[T]he Tennessee Post-Conviction Procedures Act does not permit the filing of a petition under its provisions to attack collaterally the validity of a proceeding to revoke the suspension of sentence and/or probation." *Young v. State*, 101 S.W.3d 430, 433 (Tenn. Crim. App. 2002); *see also Armistead v. State*, No. M2004-02795-CCA-R3-PC, 2005 WL 1950289, at *2 (Tenn. Crim. App. at Nashville, Aug. 15, 2005) *perm. app. denied* (Tenn. Oct. 31, 2005). This rule remains in effect even where the petitioner alleges that constitutional violations occurred before or during probation revocation proceedings. As stated by this court in *Young*:

[Post-Conviction] relief under this part shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right

guaranteed by the Constitution of Tennessee or the Constitution of the United States.

Thus, under the act, the subject of the collateral attack must either be the conviction itself or the sentence. It is clear that the appellant in [*Young*] is not attacking his conviction. Rather, as noted above, he is complaining of alleged constitutional violations that he asserts render the order revoking probation void or voidable.

. . . .

[T]he “sentence” a criminal defendant receives is the period of time that the defendant could be incarcerated. In contrast, an order revoking suspension of sentence or probation typically ends the period of suspension of the execution of the original term and mandates that the original sentence be carried out. But it cannot be said that the order revoking suspension of sentence and probation imposes a new sentence subject to collateral attack under the Tennessee Post-Conviction Procedures Act.

Young, 101 S.W.3d at 431-32 (internal citation omitted).

In the instant case, the petitioner is without remedy because he is attempting to collaterally attack the revocation of his probation. *See Young*, 101 S.W.3d at 431. Because the petitioner attacked the trial court’s order revoking his probation, and is precluded by law from doing so, we conclude that the denial of his petition was not in error. *See Armistead*, 2005 WL 1950289 at *2. Therefore, the petitioner’s argument is without merit, and he is not entitled to relief.

Additionally, the petitioner argues that the post-conviction court should have granted a delayed appeal from the revocation order. The delayed appeal provisions of the Post-Conviction Procedure Act permit the post-conviction court to grant a delayed appeal from an “original conviction,” and an order revoking probation is not an “original conviction.” Tenn. Code Ann. § 40-30-113(a) (2006); *see also Young*, 101 S.W.3d at 431-32. Therefore, we conclude that the post-conviction court did not err in refusing to grant a delayed appeal.

CONCLUSION

Based upon the foregoing reasons, we conclude that the petition was properly dismissed. The judgment of the post-conviction court is affirmed.

J.C. McLIN, JUDGE